

## EXCEPTIONAL EVENTS REFORM

- Legislation is needed to reform the Exceptional Events provisions in the Clean Air Act.
  - States should be allowed to make exceptional events determinations, after consultation with the Environmental Protection Agency (EPA).
  - Presently, EPA makes the determinations – however, the Clean Air Act provides that air pollution prevention and control is the primary responsibility of state and local governments.
  - Courts have recognized that the Act is an exercise in “cooperative federalism” in which EPA sets the national air quality standards while states retain the authority to flexibly determine how best to meet those standards.
  - States are in the best position to evaluate local and regional conditions such as windy conditions and the transport of particulate matter, which can temporarily affect local air quality monitoring data.
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- There is a need to more efficiently determine when air quality data is influenced by exceptional events. There is also a need to review and handle air quality monitoring data influenced by exceptional events in a timely manner.

### Background Information

- Congress recognized that there are exceptional events – such as high winds and wildfires – that cannot be controlled by air quality plans. In 2005, Congress amended the Clean Air Act to allow for exceptional events so that regions would not be penalized for exceedances at the monitors. The Environmental Protection Agency then developed the Exceptional Events Rule in 2007.
- The Western States Air Resources Council (WESTAR), an association of 15 western state air quality managers, identified several implementation issues with the rule. The EPA Administrators acknowledged that the rule is flawed, but contend that EPA is forced to use it.
- Arizona and WESTAR provided recommendations to improve the implementation of the rule. Correcting the rule is critical, to ensure that areas do not face continual, reoccurring nonattainment due to exceptional events beyond their control.
- On May 2, 2011, EPA provided Draft Guidance Documents on the exceptional events rule to clarify key provisions and to respond to the questions and issues that have arisen. While EPA made some improvements, several issues still remain.
- Extensive comments on the draft guidance were submitted by the Arizona Department of Environmental Quality (ADEQ), Maricopa Association of Governments (MAG), and WESTAR in June 2011.

- EPA is scheduled to respond to the comments and issue final guidance in early 2012.
  - In the Arizona desert, high winds from the weather fronts and localized storm activity move over a smooth terrain where they pick up dry, fine, silty soils and generate blowing dust on regional and local scales.
  - Local air quality monitors affected by windblown dust have recorded exceedances of the federal air quality standard for PM-10. Given the occurrence of windblown dust, Arizona cannot attain the PM-10 standard unless exceedances associated with high winds are excluded. High winds in the desert cannot be controlled by a PM-10 plan.
  - In 2011, there were 102 exceedances of the PM-10 standard in the Maricopa area. All but one of these have been due to exceptional events caused by haboobs, dust storms, thunderstorms, and residual dust. The 101 exceptional event exceedances across the monitor network resulted in 21 days of exceptional events. The ADEQ is preparing the documentation for the 2011 exceptional events, with technical assistance from Maricopa County and MAG staff.
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- Due to the requirements that must be met and the number of exceptional events that have occurred, the documentation effort is extremely resource intensive.
  - The San Joaquin Valley Unified Air Pollution Control District has indicated that 453 staff hours are needed to prepare the documentation for one high wind exceptional event. Based upon this estimate, the documentation of the 21 days of exceptional events in the Maricopa area would take 9,513 staff hours or 1,189 work days. The ADEQ is currently overwhelmed with the workload.
  - On February 6, 2012, ADEQ completed the documentation for the first package of exceptional events that occurred July 2-8, 2011. The documentation is more than 200 pages in length and took six months to assemble. Twelve additional packages have yet to be prepared to document the remaining 2011 exceptional events.
  - This raises a policy issue of whether this constitutes a wise use of resources when the exceedances were clearly due to natural causes.
  - From a policy perspective:
    - ▶ The Exceptional Events provisions in the Clean Air Act need to be reformed to allow states to make the exceptional events determinations, after consultation with EPA.
    - ▶ The amount of documentation needs to be streamlined and the determination of exceptional events needs to be made in a timely manner.
    - ▶ According to the EPA draft guidance, EPA would provide initial comments on an exceptional events submittal in 120 days and issue a final decision in 18 months; however, the final decision should be issued in substantially less time since it will determine whether a region is in compliance with the air quality standards.

H.R. \_\_\_\_\_

(11/07/2011 DRAFT)

To provide for the state implementation of exceptional events determinations and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

XX, 2011

**A BILL**

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*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,*

**Section 1. Short Title.**

This Act may be cited as the “Exceptional Events Reform Act of 2011”.

**Section 2. Findings.**

(a) The Congress finds –

- (1) The Clean Air Act (42 U.S.C. 7401 et seq.) provides that air pollution prevention and control is the primary responsibility of state and local governments.
- (2) Courts have recognized that the Act is an exercise in “cooperative federalism” in which the Environmental Protection Agency sets the level and form of national ambient air quality standards while States retain the authority to flexibly determine how best to meet those standards.
- (3) States are in the best position to evaluate local and regional conditions, such as windy conditions and the transport of particulate matter, which can temporarily affect monitoring of local air quality.
- (4) There is a need to more efficiently determine when air quality data is influenced by exceptional events as well as provide for the review and handling of air quality monitoring data influenced by exceptional events in a timely manner.

### Section 3. Amendments

Section 319 of the Clean Air Act (42 U.S.C. 7619) is amended by --

- (1) striking “location or a natural event; and” in section 319(b)(1)(A)(iii) and inserting in lieu thereof “location, a natural event or a high wind event; and”
- (2) striking section 319(b)(1)(A)(iv) in its entirety and inserting in lieu thereof “(iv) is determined by a State or tribal government, or a state or tribal entity that has been delegated authority by the Governor of a state or by a tribal government, after consultation with the Administrator, to be an exceptional event.”
- (3) deleting section 319(b)(1)(B) in its entirety.
- (4) inserting after section 319(b)(1)(A) the following:
  - “(B) Definition
  - “In this subsection –
  - (i) the term ‘natural event’ means an event in which human activity plays little or no direct causal role;”
  - (ii) the term ‘high wind event’ means an event where particulate matter is raised or transported by high winds.”
- (5) deleting section 319(b)(3)(B)(iv) in its entirety and strike “; and” at the end of section 319(b)(3)(B)(iii) and insert instead “.”.
- (6) deleting section 319(b)(4) in its entirety.

### Section 4. Revision

- (a) In General. – On the first day of publication of the Federal Register that is 180 days or more after the date of enactment of this Act but not more than 270 days after the date of enactment of this Act, the Administrator of the Environmental Protection Agency shall publish in the Federal Register a final rule regarding exceptional events, which –
  - (1) is deemed to be issued under section 319 of the Clean Air Act (42 U.S.C. 7619), as amended by this Act; and
  - (2) shall be deemed to be in compliance with all applicable provisions of chapter 5 of title 5, United States Code, section 307 of the Clean Air Act (42 U.S.C. 7607), and all other provisions of law relating to rulemaking procedures.
- (b) Contents of Rule. – Except as provided in this subsection, the final rule published under subsection (a) of this section shall be identical in its provisions to the part 50 and part 51 regulations promulgated by the Administrator of the Environmental Protection Agency in the March 22, 2007, issue of the Federal Register (72 Fed. Reg. 13,580-13,581). Such rule shall --
  - (1) delete “or a natural event” in 40 C.F.R. 50.1(j) and insert “or a natural event or high wind event” in lieu thereof;
  - (2) “the Administrator” in 40 C.F.R. 50.1(j) and insert “a State or tribal government, or a state or tribal entity that has been delegated authority by the Governor of a state or tribal government” in lieu thereof;
  - (3) strike the last sentence in 40 C.F.R. 50.1(j)
  - (4) insert the following definition in 40 C.F.R. 50.1: “(m) “*High wind event* means an event where ambient particulate matter concentrations due to dust and other matter

- are raised by high winds. Such an event exists where: (1) the dust or other matter originated from nonanthropogenic sources, or (2) the dust or other matter originated from anthropogenic sources within a State, that are determined by the State to have been reasonably controlled at the time that the event occurred, or (3) the dust or other matter originated from anthropogenic sources outside the State.”;
- (5) delete “may request EPA to” in 40 C.F.R. 50.14(a)(1) and insert “or tribal government or state or tribal entity may, after consultation with the Administrator,” in lieu thereof;
  - (6) delete “demonstrating to EPA’s satisfaction” in 40 C.F.R. 50.14(a)(1) and insert “determining” in lieu thereof;
  - (7) delete “Demonstration to justify data exclusion may include” in 40 C.F.R. 50.14(a)(2) and insert “A State or tribal government or a state or tribal entity may rely on” in lieu thereof;
  - (8) delete “demonstrate” in 40 C.F.R. 50.14(a)(2) and insert “determine” in lieu thereof;
  - (9) insert before the period at the end of 40 C.F.R. 50.14(a)(2) “for events for which data was flagged during calendar years 2004-2006. For exceptional events in years following 2006, a State or tribal government or state or tribal entity may rely on any reliable data that indicates a clear causal relationship between the measured exceedence or violation of such standard and the event and comply with paragraph (c)(4)(i) of this section”
  - (10) delete “State demonstrates to EPA’s satisfaction” in 40 C.F.R. 50.14(b)(1) and insert “State or tribal government or state or tribal entity determines” in lieu thereof;
  - (11) delete “State demonstrates to EPA’s satisfaction” in 40 C.F. R. 50.14(b)(2) and insert “State or tribal government or state or tribal entity determines” in lieu thereof;
  - (12) delete “a State demonstrates” in 40 C.F. R. 50.14(b)(2) and insert “a State or tribal government or state or tribal entity determines” in lieu thereof;
  - (13) delete “where a State demonstrates to EPA’s satisfaction” in 40 C.F.R. 50.14(b)(3) and insert “where a State or tribal government or state or tribal entity determines” in lieu thereof;
  - (14) delete “that EPA determines meets the definition in § 50.1(j), and provided that the State has certified to EPA that it” in 40 C.F.R. 50.14(b)(3) and insert “and a State or tribal government or state or tribal entity” in lieu thereof;
  - (15) insert following the reserved section in 40 C.F.R. 50.14(b)(4) the following:  
 “EPA shall exclude data from use in determinations of exceedences and NAAQS violations where a State or tribal government or state or tribal entity determines that emissions causing the exceedences or NAAQS violations were caused by a natural event or a high wind event.”
  - (16) delete 40 C.F.R. 50.14(c)(2)(ii) in its entirety;
  - (17) delete 40 C.F.R. 50.14(c)(3) and 40 C.F.R. 50.14(c)(3)(i) in its entirety, insert “(3) *Demonstrations.*” in lieu thereof and renumber the remaining subparagraphs accordingly;
  - (18) delete “, must adopt procedures and requirements specified in paragraph (c)(3)(i) of this section and” in 40 C.F.R. 50.14(c)(3)(ii)
  - (19) insert “for data collected during calendar years 2004-2006” after “The demonstration” in 40 C.F.R. 50.14(c)(3)(iii);

- (20) insert following “(v) [Reserved] (A) [Reserved]” in 40 C.F.R. 50.14(c)(3) the following “(4) *Documentation*. (i) A State or tribal government that has flagged data as being due to an exceptional event shall document that the event meets the requirements of section 319 of the Clean Air Act (42 U.S.C. § 7619). (ii) Upon receipt of such documentation, the Administrator shall exclude the flagged data from use in determinations by the Administrator with respect to exceedences or violations of the NAAQS.”
  - (21) delete “requesting to exclude” in 40 C.F. R. 51.930(a) and insert “or tribal government or state or tribal authority that determines” in lieu thereof and insert “is” after “data”;
  - (22) insert “or tribal government or state or tribal entity” after “State” in the second sentence of 40 C.F.R. 51.930(a); and
  - (23) insert after 40 C.F.R. 51.930(a)(3) the following: “(4) Provide as necessary that all provisions of the rule take effect no later than 1 year after the date of enactment of this Act.
- (c) Amendments to Rule. – Prior to making amendments to the rule published under paragraph (1), the Administrator of the Environmental Protection Agency shall promulgate a proposed rule in accordance with chapter 5 of title 5, United States Code and section 307 of the Clean Air Act (42 U.S.C. 7607).
- (d) Rule of Construction.—Except as provided in subsection (b) of this section, nothing in this section shall be construed to limit the authority of the Administrator of the Environmental Protection Agency to amend, in accordance with chapter 5 of title 5, United States Code, or sections 307 and 319 of the Clean Air Act (42 U.S.C. 7607, 7619) the regulation promulgated pursuant to this section.

## **Section 5. Effect**

Legislative amendments enacted by this Act shall take effect upon the date of enactment and be applicable to exceptional events that occur after December 31, 2006.

## **Exceptional Events Reform Act of 2011**

### **Section 1. Short Title**

The short title for the legislation is the “Exceptional Events Reform Act of 2011.”

### **Section 2. Findings**

The legislation makes four findings based on the historic construction and interpretation of the Clean Air Act (42 U.S.C. § 7401 *et seq.*) and the need to more efficiently address the review and treatment of air quality data affected by exceptional events.

### **Section 3. Amendments**

The legislation makes several targeted amendments to section 319 of the Clean Air Act (42 U.S.C. § 7619):

- First, the legislation provides that States and tribal governments (or state and tribal organizations that are delegated authority) are to determine when air quality conditions qualify as “exceptional events.” Consistent with the Findings, the legislation places responsibility at the state and tribal levels for determining, after consultation with the Environmental Protection Agency (“EPA”), when exceptional events occur and therefore, when air quality data associated with exceptional events can be excluded from determinations of compliance with national ambient air quality standards (“NAAQS”).
- Second, the legislation retains the previous definition of what constitutes an “exceptional event” while also providing a definition for a “natural event” consistent with the definition utilized in existing Environmental Protection Agency (“EPA”) regulations. The legislation also provides a definition for “high wind event” to clarify the treatment of windblown dust and other particulate matter.
- Third, the legislation deletes limitations on the definition of an exceptional event which provide that stagnant air masses, high temperatures and a lack of precipitation or air pollution “relating to” source noncompliance prevent flagging and excluding associated air quality data as an exceptional event. Instead, state and tribal governments will make a case-by-case determination as to whether measured air quality qualifies as an exceptional event.
- Finally, the legislation deletes an unnecessary transitional provision that provided, prior to the promulgation of regulations under Clean Air Act section 319, pre-existing EPA guidance controlled the consideration and exclusion of air quality data associated with exceptional events.



## **Section 4 Revision**

The legislation requires EPA to propose and publish final regulations for exceptional events no later than 270 days after the enactment of the legislation. In order to meet this schedule and to ensure that final regulations are consistent with Congressional intent and the legislative amendments to Clean Air Act section 319, the legislation: (1) retains current regulations promulgated by EPA in 2007; while (2) making targeted changes to the 2007 regulations.

The legislation provides three different categories of regulatory changes:

- First, the legislation makes several changes to ensure that a State or tribal government, or a state or tribal entity that has been delegated authority is the locus of decisionmaking on exceptional events determinations after consultation with EPA. The regulatory changes ensure that states and tribes or entities that have been delegated state or tribal authority, after consultation with the EPA, make all decisions on what air quality data qualifies as an exceptional event. Under the new regulations, EPA will be required to exclude data determined by states, tribes or other qualified authorities to constitute an “exceptional event”.
- Second, the legislation imposes regulations to require that States and tribal governments document data that has been “flagged” as an exceptional event and retains requirements in current regulations that there is a clear causal relationship between a measured exceedence of a NAAQS and an exceptional event. The legislation also retains current regulatory requirements that require prompt public notification whenever air quality is expected to exceed NAAQS levels, public education efforts to inform individuals how to reduce exposure to elevated levels of NAAQS pollutants and implementation of appropriate measures to protect public health.
- Third, the legislation provides for conforming regulatory changes to incorporate the specification of “natural events” and “high wind events” contained in the legislative changes to the Clean Air Act and for transitional provisions for events occurring in 2006 and prior to 2006 and for events occurring in 2007 and thereafter.

## **Section 5. Effect**

The legislation provides that the amendments to the Clean Air Act take effect upon date of enactment of this legislation and are applicable to events that occur in 2007 and thereafter.



## Exceptional Events Reform Act of 2011

### Need for Legislation

- Many areas of the country are affected by air quality conditions that are out of their control. Windblown dust and particulate matter may travel tens or hundreds of miles affecting air quality in “downwind” areas. Excessive heat and drought can exacerbate normal conditions and make elevated levels of air pollution more likely.
- The Clean Air Act (“CAA”) contains authority to exclude “exceptional events” from determinations of whether an area is in compliance with National Ambient Air Quality Standards (“NAAQS”). Under the CAA, air quality conditions associated with events that are not “reasonably controllable or preventable” and other events can be excluded from the determination of whether an area is meeting (“attaining”) a NAAQS.
- Although the Environmental Protection Agency (“EPA”) promulgated regulations to address exceptional events in 2007, current regulations present states, tribes and local governments with a data-intensive and time-consuming process for obtaining EPA assent. States and localities must obtain agreement from EPA Regional offices in consultation with EPA Headquarters regarding their assessment of local air quality conditions and the reasons why an area experienced air monitoring exceedences.
- The Exceptional Events Reform Act of 2011 attempts to streamline the exceptional events process by returning control over such decisions to states and tribes. States and tribes would be authorized to make “case-by-case” determinations as to when natural conditions, windblown dust and other forces outside of their control caused air quality monitors to register a NAAQS exceedence. Upon determination by a state or tribal government that an exceedence was due to an exceptional event, EPA would be required to exclude the data from determinations of CAA compliance.
- The legislation recognizes that States, tribes and local governments have been primarily responsible for implementing the CAA for the last 50 years. In addition, by developing and implementing multiple State Implementation Plans (“SIPs”) and SIP revisions to address CAA requirements, states, tribes and local governments have developed the necessary technical expertise and staff resources to evaluate the complex meteorology and atmospheric conditions that may be involved in exceptional events.
- A legislative fix would allow EPA to continue its defined role in the CAA implementation process – EPA would continue to review and approve SIPs that provide the detailed mechanisms to attain NAAQS. But the legislative fix would return control of exceptional event determinations to states and tribes who are in the best position to evaluate local air quality conditions and programs.

- Importantly, the Exceptional Events Reform Act of 2011 retains all current requirements to notify and the public of air quality conditions and provide information to the public on how to reduce exposures to elevated levels of air pollution. States or tribes must also provide for the implementation of appropriate measures to protect public health from exceedances or violations of NAAQS caused by exceptional events. But the legislation would ensure that states, tribes and local governments are not penalized for air quality conditions that are beyond their ability to control or prevent.

## Background Information

- Congress recognized that there are exceptional events – such as high winds and wildfires – that cannot be controlled by air quality plans. In 2005, Congress amended the CAA to allow for exceptional events so that regions would not be penalized for NAAQS exceedances at air quality monitors due to exceptional events. EPA then developed the Exceptional Events Rule during 2006 and finalized the rule in 2007.
- Implementation of the Exceptional Events Rule, however, has been cumbersome and time consuming. In order to have data excluded from NAAQS determinations, States and local governments must assemble massive amounts of data regarding even a single exceedance of a NAAQS. Considerable resources are spent both in developing the information for submittal to EPA and for EPA's review of the data and information submitted by states.
- Due to the requirements that must be met and the number of exceptional events that have occurred, the documentation effort is extremely resource intensive. For example, the San Joaquin Valley Unified Air Pollution Control District has estimated that 453 staff hours are needed to prepare the documentation for just one high wind exceptional event. Based upon this estimate, the documentation of the 21 days of exceptional events that the Maricopa area in Arizona experienced in one year would take 9,513 staff hours or 1,189 work days.
- The Arizona Department of Environmental Quality is currently overwhelmed with the exceptional events workload. For example, although there were limited numbers of exceptional events in 2009 and no events in 2010 in the Maricopa area, during 2011 this area experienced 102 exceedances of the PM-10 standard. All but one of these events was due to the existence of haboobs, dust storms, thunderstorms, and residual dust. To have such events excluded from determinations of air quality compliance, Arizona will need to expend considerable financial resources to provide the detailed written descriptions, supporting information and data that EPA currently requires.
- While EPA and states have made efforts to work together to improve the exceptional events process, there is inevitable delay and uncertainty associated with current exceptional events regulations. Upon the submittal of data and information on exceptional events, States and local governments simply do not know whether EPA will agree with their technical assessments or require additional supporting information. In

certain cases, states and local governments may also disagree with EPA's assessment of the necessary conditions to establish an exceptional event occurred.

## **Legislative Provisions**

### **Findings**

- The Exceptional Events Reform Act of 2011 recognizes that state and local governments are primarily responsible to implement the CAA. This provision of the law dates back to 1963. Section 101(a)(3) of the CAA declares that "air pollution control at its source is the primary responsibility of States and local governments."
- Second, the legislation cites court opinions that have described the CAA as an exercise in "cooperative federalism" where the EPA sets the level and form of air pollution control standards, but States and local governments are responsible to draft and implement SIPs for various NAAQS.
- Third, the legislation recognizes that states and local governments are responsible for day-to-day air quality management activities. States and local governments deploy air pollution control monitors and gain considerable on-the-ground experience with local and regional weather conditions and patterns and how conditions can affect the measurement of different NAAQS.

### **Clean Air Act Amendments**

- The Exceptional Events Reform Act of 2011 amends section 319 of the CAA to make targeted changes to current law defining exceptional events and when such events can be excluded from data determining NAAQS compliance. The legislation maintains the current "principles and requirements" regarding exceptional events enacted by Congress as well as requirements for the promulgation of regulations concerning the review and handling of air quality data affected by exceptional events.
- The Exceptional Events Reform Act provides that States or tribal governments, after consultation with the EPA, are responsible for determining when an exceptional event occurs. The legislation eliminates certain exclusions from exceptional events (stagnant air masses, inversions, high temperatures or lack of precipitation) and instead allows for a case-by-case determination of conditions. The legislation also removes source noncompliance as a separate basis for excluding an exceptional event, relying instead on implementation of SIPs to control sources and provide for NAAQS attainment.
- Finally, the legislation provides definitions for a "natural event" based on current EPA regulatory language and a separate definition for high wind events. High wind events were discussed in the preamble to EPA's current exceptional event regulations, but not originally included within those regulations.

### **Promulgation of New Regulations**

- The legislation requires EPA to propose and publish final regulations for exceptional events no later than 270 days after the enactment of the legislation. The legislation retains the structure and much of the text of current regulations promulgated by EPA in 2007; while making changes to conform the regulations to the new CAA requirements being established.
- First, the legislation makes several changes to ensure that a State or tribal government, or a state or tribal entity that has been delegated authority, after consultation with EPA, is the locus of decisionmaking on exceptional events determinations. The regulatory changes ensure that states and tribes or entities that have been delegated state or tribal authority make all decisions on what air quality data qualifies as an exceptional event, transferring this authority from EPA.
- Second, the legislation retains requirements in current regulations that there must be a clear causal relationship between a measured exceedence of a NAAQS and an exceptional event while imposing requirements for States and tribal governments to document data that has been “flagged” for exclusion as an exceptional event. The legislation also retains current regulatory requirements that require prompt public notification whenever air quality is expected to exceed NAAQS levels, public education efforts to inform individuals how to reduce exposure to elevated levels of NAAQS pollutants and implementation of appropriate measures to protect public health.
- Third, the legislation provides for conforming regulatory changes to incorporate the specification of “natural events” and “high wind events” contained in the legislative changes to the CAA and for transitional provisions for events occurring in 2006 and prior to 2006 and for events occurring in 2007 and thereafter.